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IN THE

Supreme Court of the United States

October Term, 1964.

Nos. 249 and 321

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 and 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,

Petitioners,

vs.

JEWEL TEA COMPANY, INC.,

Respondent.

ASSOCIATED FOOD RETAILERS OF GREATER CHICAGO, INC., ET AL.,

Petitioners,

vs.

JEWEL TEA COMPANY, INC.,

Respondent.

RESPONSE TO MEMORANDUM FOR THE UNITED STATES.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 240.

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 and 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,

Petitioners,

vs.

JEWEL TEA COMPANY, INC.,

Respondent.

No. 321.

ASSOCIATED FOOD RETAILERS OF GREATER CHICAGO, INC., ET AL.,

Petitioners,

vs.

JEWEL TEA COMPANY, INC.,

Respondent.

RESPONSE TO MEMORANDUM FOR THE UNITED STATES.

The Memorandum of the Solicitor General does not urge the Court to grant certiorari, claim that the decision below is in conflict with any decision of this Court, or that any vital activity of the Government is involved. While

the Solicitor is of the opinion the decision is erroneous, he does not say why. In any event mere error is not ground for certiorari.

If the Memorandum be distilled to its essence it will be seen it says simply that if certiorari should be granted the Solicitor General would file a "comprehensive statement of principles" which he believes should govern the application of the antitrust laws to multi-employer collective bargaining. However, multi-employer collective bargaining as such is not in issue for the decision below in no way condemns or impinges upon it. In accord with the principles heretofore established in *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797 (1945), it simply reaffirms that such bargaining may not embrace commercial restraints of trade save in such instances as they directly concern terms and conditions of employment as permitted by *Teamsters Union* v. *Oliver,* 358 U. S. 283 (1959). Both of those cases are discussed and followed in the first Court of Appeals opinion herein (Pet. 12a, *et seq.*) which is specifically readopted by the second opinion (Pet. at 5a). Thus the Court of Appeals promulgated no new doctrine but simply evaluated particular facts within existing guide lines established by this Court.

1. Since there is no indication in the Memorandum as to what impelled its presentation, we trust, with due and friendly respect to the Solicitor General, that we may observe that its expression, usual in documents emanating from the office of the Solicitor General, that it represents the views of "the United States" is, in the circumstances, perhaps mere conventional gloss. One would have supposed that "the United States," or at least the Antitrust Division, would be "concerned" that there was a combination denying the people of Chicago reasonable access to fresh meat rather than being "concerned" over a unanimous decision that such restraint is illegal. What the

Memorandum overlooks is that convenience of shopping hours is an important element of commercial competition. The restraint at bar eliminates that element just as the price fixing agreements and territorial restrictions in *Allen Bradley* eliminated other elements.

2. The Memorandum picks at, and would divorce the short phrase "proprietary functions" from the context of the record; it speculates that in the future some court may expand use of the phrase to ban multi-employer labor contracts on "familiar" subjects, i.e., terms and conditions of employment. The speculation is unwarranted. If the supposed danger should ever arise it could be met.

3. The Solicitor General has misconceived the facts: The Memorandum assumes (p. 2) that the defendant unions represent butchers who prepare and "*sell* the meat." But the record is completely clear that in self-service meat markets the butchers *do not sell meat*. The customer selects the meat from a self-service case and carries it to the store cashier (who is a member of a totally different bargaining unit whose members are on duty after butchers have ceased to work), and there purchases it (App. 551). There is no necessity, in a self-service market, for butchers to be present at all hours when meat is purchased. The Solicitor General errs in his apparent assumption to the contrary.

4. The failure of the Memorandum to confine itself to the record and its assumption that it would be proper for the Solicitor General to postulate "a comprehensive statement of general principles" on the general subject matter unfortunately amounts, in our humble opinion, to an invitation to the Court to permit the Solicitor General, and perhaps itself, to roam at large through legislative territory.

And even were such a deployment proper, this case would not furnish a suitable vehicle for establishment of "gen-

eral principles" because a self-service retail meat market presents an operating situation quite different from those of general industry. In general industry hours of work necessarily are the same, in most instances, as those during which the enterprise may function. But purchases in a self-service meat market may be made without the intervention of a butcher. The opinion at bar therefore strikes down a unique and atypical effort by an employer-union combination to go entirely beyond the matter of hours of work for employees in the bargaining units involved to inhibit competition as to hours during which market operators permit the public to make purchases. Because the case is atypical the decision creates no "uncertainty" as to "subjects which have become a familiar part of collective bargaining" —the issue here is not as to such subjects.

There can be no logical or tenable objection to the Court of Appeals ruling on the facts of this record that hours in which a merchant may keep his store open to enable customers to make self-service purchases of meat is not the same thing as hours of employment for butchers. Regulation of the former is not necessary to protect the right of unions to bargain as to the latter.

Respectfully submitted,

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